Petition

81-2043

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NO.

OIL TRANSPORT COMPANY and
GYPSUM TRANSPORT, INC.,

Petitioners,

VS.

UNION OF TRANSPORTATION
EMPLOYEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the question of arbitrability of an issue involving a conflict between a collective bargaining agreement and federal and state administrative agencies is for the federal court when enforcement of arbitration is sought under §301(a) of the National Labor Relations Act, 29 U.S.C. §185(a) or whether the matter of legality of a contract or conflict with administrative agencies is a question for arbitration.

(2) Whether Petitioners are denied due process of law because of the different standard of review under federal law in §301(a) National Labor Relations Act actions between the initial action for enforcement of arbitration and the federal review of the enforcement of an arbitration award.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OIL TRANSPORT COMPANY and GYPSUM TRANSPORT, INC., petitions for a Writ of Certiorari to review the Judgment, Decision and Order of the Court of Appeals for the Fifth Circuit, reversing and remanding, with instructions, an order of the United States District Court for the Northern District of Texas granting Petitioners' Motion for Summary Judgment and denying Respondent's Petition to enforce arbitration.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is No. 80-2291 of the Fifth Circuit Court of Appeals decided February 25, 1982 and cited as 668 F2d 821. Judgment was entered on February 25, 1982 (Appendix B). The Order

and Judgment of the United States District Court for the Northern District of Texas is dated October 28, 1980 (Appendix C).

JURISDICTION

The Judgment of the Court of Appeals was entered on February 25, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the question of arbitrability of an issue involving a conflict between a collective bargaining agreement and federal and state administrative agencies is for the federal court when enforcement of arbitration is sought under § 301(a) of the National Labor Relations Act, 29 U.S.C. § 185(a) or whether the matter of legality of a contract or conflict with administrative agencies is a question for arbitration.

(2) Whether Petitioners are denied due process of law because of the different standard of review under federal law in § 301(a) National Labor Relations Act actions between the initial action for enforcement of arbitration and the federal review of the enforcement of an arbitration award.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of the Fifth Amendment to the Constitution, U.S. Constitution Amendments V and § 301(a) of the National Labor Relations Act 29 U.S.C. § 185(a). These are presented separately as Appendix D to this Petition.

STATEMENT OF THE CASE

Petitioners are specialized common carriers operating under the authorities of the Interstate Commerce Commission and Railroad Commission of Texas, an agency of the State of Texas. Petitioners are subject to rules and regulations of these Commissions and subject to tariff regulations for the revenue for shipments of various commodities such as gasoline and gypsum board. Respondent is a labor organization within the meaning of the National Labor Relations Act and represents various operational employees of Petitioners such as drivers and mechanics.

On January 6, 1978, and February 17, 1978, respectively, Petitioners entered into collective bargaining agreements with Respondent which were in full force and effect at all times material to this matter.

Pursuant to these two agreements Petitioners agreed that any "fuel surcharge would be included in computations of pay." This agreement had also been included in former contracts entered into three years before the date of the current agreements. Prior to May 29, 1979, Petitioners had included fuel surcharges in the computation of driver's pay. Beginning May 29, 1979, the Railroad Commission of Texas, Transportation Division, pursuant to its authority under the Motor Carrier Act of Texas, issued an order granting Petitioners certain relief for fuel increase costs in fuel adjustment charges and ordered, among other things, that "the amount of the increased revenue authorized" pursuant to the order was "to accrue and be paid only to the purchaser of the fuel with no portion thereof to be expended for any other costs" incurred by the carriers in the transportation of shipments subject to said rates.

On June 1, 1979, the Interstate Commerce Commission under authority of the Federal Motor Carrier Act and the

Administrative Procedure Act issued an order in ex parte number 311 whereby carriers subject to the rules and regulations established by the ICC were allowed to file for rate increases through the computation of a fuel surcharge to alleviate increased fuel costs. The ICC further ordered that "the person actually responsible for the payment of fuel charges for contract or otherwise is to receive the fuel increase in revenue derived from fuel increases published." There is no dispute between Petitioners and Respondent in reference to the existence or content of these orders of the regulatory bodies. Petitioners were subject to the authority of both Federal and State Commissions. As a result of these orders, Petitioners ceased and refused to continue to include the fuel surcharge in the computation of driver's pay.

Respondent filed grievances complaining of a breach of the collective bargaining agreement. The grievances were denied by the Petitioners. Respondent sought arbitration pursuant to the bargaining agreement and Petitioner refused to proceed to arbitration on the grounds that the terms of the bargaining contracts requiring fuel surcharges be included in computation of driver's pay were in conflict with the orders of the administrative bodies.

Respondent then filed a complaint in federal court under § 301(a) of the Labor-Management Relations Act to require Petitioners to proceed to arbitration. Both parties sought summary judgment as there were no disputed issues.

Petitioners prevailed in the District Court on the grounds that the threshold question of arbitrability was one for the courts and not for the arbitrator and that the issue of a conflict between statutes or administrative bodies and a collective bargaining agreement was one solely for the courts in the first instance.

The District Court denied Respondent's Motion for Summary Judgment and granted Petitioners' Motion for the reason stated in the order (Appendix C). The Court stated that the provisions for payment of fuel surcharge in the collective bargaining agreement were clear in meaning and intent and the dispute between the parties did not involve an interpretation of the contract provisions, but only the validity of the contract provisions in light of the Interstate Commerce Commission and Railroad Commission decisions and orders.

The District Court held jurisdiction to determine the dispute and found the collective bargaining provisions illegal in the face of the Commissions' orders, and also found that arbitration was futile and should not be ordered.

The Court of Appeals for the Fifth Circuit reversed and remanded with instructions stating that the matter should be arbitrated and relief deferred, if appropriate, to an enforcement of arbitration proceeding.

REASONS FOR GRANTING THE WRIT

This issue is novel and should be considered by the Court as a matter of clarification of the distinction between the authority of the court and the arbitrator. Only once before has the Federal Circuit Court touched on this question.

In *Associated Milk Dealers, Inc. vs. Milk Drivers Union Local 753,* 422 F2d, 546 (CA 7, 1970) the Circuit remanded a case to the District Court for consideration of a conflict between collective bargaining contract terms and anti-trust laws. The Court said that enforcement of arbitration could give support to an illegal clause. Clearly, illegality of a provision in a bargaining agreement should be decided by the court and not arbitrators when stacked against statutes or administrative decisions. The Seventh Circuit also com-

mented that "arbitrators are ill equipped to interpret the anti-trust laws and their consideration of possible violations would add little." It is submitted that courts should also decide conflicts between decisions of administrative bodies or statutes prior to enforcing arbitration.

The seriousness and importance of this issue is apparent. Regardless of the statement of the Court of Appeals in this matter, there is a clear conflict between the collective bargaining agreement and administrative bodies. The District Court considered the conflict just as the Fifth Circuit intimated a District Court should have done in *Seaboard Coastline Railroad Company vs. National Rail Passenger Corporation,* 554 F2d, 657 (CA 5 1977). Although this was not a collective bargaining contract the same issue applies. Parties should not be forced into futile arbitration by federal order. The resolution of statutory or constitutional issues is a primary responsibility of the courts. *Alexander vs. Gardner-Denver Company,* 415 U.S. 36 at page 57, Administrative orders clearly fall into this category.

The due process question arises in the decision of the Circuit Court here that petitioner is amply protected by a right of review after arbitration. This is a second federal proceeding. Petitioner would show that the standard of court review is different in such procedures. In the first instance there is a threshold question of jurisdiction or arbitrability where an issue of illegality is raised. In the last instance, the review is whether or not the arbitrator acted arbitrarily and/or outside the scope of the agreement. *Steelworkers vs. Enterprise Wheel and Car Corp.,* 363 U.S. 593. Petitioner would be prejudiced if forced to arbitrate a court question and then be faced with the stringent standard of review on enforcement of a decision of the arbitrator. The matter should be decided by the courts in the first instance and a consideration of illegality

should be dispositive of the issue. Here the District Court did not consider the merits of a dispute but simply compared contract language to administrative orders. The District Court properly decided the issue of legality of the bargaining contracts language and found arbitration futile in the face of contra administrative orders.

CONCLUSION

This Court has not ruled on the question of court review of legality of contract terms prior to enforcing arbitration. The body of federal labor law requires clarification of this issue.

It is respectfully submitted that the Court should grant Petitioner's prayer for a Writ of Certiorari.

Respectfully submitted,

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Appendix

APPENDIX A

UNION OF TRANSP. EMP. v. OIL TRANSPORT CO.

UNION OF TRANSPORTATION EMPLOYEES,

Plaintiff-Appellant,

v.

OIL TRANSPORT COMPANY, et al.,

Defendants-Appellees.

No. 80-2291.

United States Court of Appeals, Fifth Circuit.

Feb. 25, 1982.

Union appealed from order of the United States District Court for the Northern District of Texas, Robert W. Porter, J., which declined to order arbitration. The Court of Appeals, Coleman, Circuit Judge, held that arbitration should have been ordered with the issue of whether relief was barred by the Interstate Commerce Commission and the Texas Railroad Commission being reserved for determination in any suit to enforce the arbitrator's decision.

Reversed and remanded with directions.

1. Labor Relations — 435

Where collective bargaining agreement called for certain pay to be based on a formula tied to freight rates and fuel charges and where Texas Railroad Commissions later issued a relief order authorizing increased revenues in the form of fuel adjustment charges and additional orders which, along with an ICC decision, provided that the person responsible for the payment of the fuel charges was to receive full increase in the revenue in the surcharges, dispute as to whether the new fuel surcharges should be included in com-

puting pay was arbitrable with the issue of whether the ICC and Railroad Commission orders precluded relief being reserved for determination in any enforcement suit.

2. Labor Relations — 434

Arbitration is not required on subject clearly excluded by the terms of labor contracts or which, with equal clarity, would violate the law.

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

COLEMAN, Circuit Judge.

The difficulty with this case is that the District Court, by summary judgment, declined to order arbitration of a union grievance; instead, it held that the issue sought to be taken to arbitration was barred by order of the Interstate Commerce Commission and the Texas Railroad Commission. We are of the opinion that arbitration should have been ordered and the issue of relief should have been reserved for determination if and when there was a suit to enforce the decision of the arbitrator.

In January and February of 1978 the Union of Transportation Employees (Union) entered into contracts with Oil Transport Company and Gypsum Transport, containing mechanisms for the computation of drivers' pay, based on a formula tied to freight rates and fuel surcharges.

Until May, 1979, the defendant companies followed the contract language, but then the Railroad Commission issued a relief order authorizing increased revenues in the form of fuel adjustment charges. Two additional orders appeared in June, 1979, along with an Interstate Commerce Commission decision, providing that the person responsible for the payment of fuel charges, by contract or otherwise, is to receive

the full increase in revenue derived in surcharges. The defendant companies, relying on these orders, refused to include the fuel surcharges in computing drivers' pay. Although grievances were filed, the defendants refused to proceed to arbitration, which the Union alleges violated contract provisions for binding arbitration of grievances.

The Union filed a complaint to compel arbitration in the District Court, in January, 1980, and then filed a motion for partial summary judgment in August, 1980. Defendant companies filed a cross-motion for summary judgment, which was granted on the ground that the contract provisions were in direct conflict with the orders of the Interstate Commerce Commission and the Texas Railroad Commission.

The Union argues that the District Court considered the merits of the grievance rather than enforcing the agreement to arbitrate. Briefly, the Union maintains that the merits of the dispute should not have been reached, and cites cases holding that the courts have no business interfering with arbitration disputes, especially where no national policy is being f.. trated; only if the arbitration award would violate an Interstate Commerce Commission or Railroad Commission order could the defendant companies challenge enforcement.

The Union urges that the contract does not require that surcharges be paid directly to the drivers; that what it does require is that the surcharge revenue shall be included in the mathematical indicator for the computation of drivers' pay. It is insisted that there is no clear and irreconcilable conflict between the contract and the orders, therefore the District Court should have deferred to arbitration.

This is a labor dispute and it is admitted that federal labor policy favors arbitration. *See, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

In that case, in a suit brought under the statute invoked here, the Union and the employer had a contract with an arbitration clause. When a dispute arose over employees being laid off who were then hired at lower wages by another company to do work for the original employer the Union sought arbitration and the employer rejected it, claiming that the procedure came within the management exception stipulated in the contract. The District Court agreed with the employer and dismissed the suit, 168 F.Supp. 702. The Fifth Circuit affirmed, 269 F.2d 633. The Supreme Court reversed, saying, 363 U.S. at 582, 80 S.Ct. at 1353:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage (footnote omitted)."

The Court went on to say that:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

The High Court concluded by saying:

> "Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the Courts."

To like effect (with emphasis), see *United Steelworkers v. American Manufacturing Company,* 363 U.S. 564,[1] 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960).

The contract here in issue provided (Article 5:22):

> Effective January 15, 1978, drivers employed by Oil Transport Company will be paid on a percentage of revenue on current freight rates received by the company and increases or decreases thereof" (followed by specifications of the standard).

[1] While we intimate no opinion as to the ultimate decision of this controversy, it is at least arguable that the orders or the respective Commissions said nothing about the wages to be paid the drivers or the standards by which the wages were to be computed. The orders said nothing about what is to be paid by the employers from resources independent of those received from the fuel surcharges. In the words of *Warrior* and *Gulf, supra,* we cannot with positive assurance say that the wage agreement is not susceptible to the interpretation claimed by the Union.

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[1] "The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in a written instrument which will support the claim. The agreement is to submit all claims to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *Id.* at 568, 80 S.Ct. at 1346.

It follows, we think, that the meaning of the contract should have been submitted to arbitration. We accordingly reverse the summary judgment of the District Court and remand with directions that arbitration be ordered.

[2] In so doing, we expressly disclaim any notion of requiring arbitration on subjects clearly excluded by the terms of labor contracts or which, with equal clarity, would violate the law. What we must require here is that the meaning of the contract *vis a vis* the use of the fuel surcharges as a standard for wage determination be submitted to arbitration. The employers have their well known *post arbitration* rights.

The parties have raised several interesting contentions of an ancillary or subsidiary nature. In view of the foregoing we need not reach or decide them at this point.

REVERSED and REMANDED, with directions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 80-2291

D.C. Docket No. CA 3 80 37F

UNION OF TRANSPORTATION EMPLOYEES,
Plaintiff-Appellant,

versus

OIL TRANSPORT COMPANY, ET AL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

February 25, 1982

Issued as Mandate:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNION OF TRANSPORTATION EMPLOYEES

vs.

OIL TRANSPORT COMPANY AND GYPSUM TRANSPORT, INC.

CIVIL ACTION NO. CA3-80-0037-F

ORDER

Came on for hearing in the above styled and numbered cause the Motion for Summary Judgment of the Plaintiff, and the Motion for Summary Judgment of the Defendants, and the Court, having considered the pleadings filed herein and having heard argument of counsel thereon, is of the opinion that the collective bargaining contract in question entered into between Plaintiff and each of the Defendants, to the extent that such Defendants provide that "fuel surcharge will be used in computation of pay" are in direct conflict with the decisions and orders of the Interstate Commerce Division and Railroad Commission of Texas and that under such circumstances, Defendants' refusal to proceed to arbitration based on the defense of illegality of such labor contract clauses is with merit. *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753,* 422 F.2d 546 (7th Cir. 1970); *General Warehousemen* and Helpers Local 767 v. Standard Brands, Inc., 560 F.2d 700 (5th Cir. 1977), cert. denied 443 U.S. 913 (1979). *Cf. United Steelworkers v. U.S. Gypsum Co.,* 492 F.2d 713 (5th Cir. 1974)

(adequate basis for refusing to enforce arbitrator's award is that it would require violation of a statute).

The Court is further of the opinion that the collective bargaining provisions in question are clear in meaning and intent and that the dispute between the parties does not involve the interpretation of such contract provisions, but only their validity in light of the Interstate Commerce Commission and Railroad Commission's decisions and orders. The Court is of the opinion that under such circumstances, this Court has jurisdiction to determine the dispute between the parties and finds that such contract provisions are illegal in light of the decisions and orders of the Interstate Commerce Commission and Railroad Commission of Texas and that arbitration of the dispute is futile and should not be ordered in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court has jurisdiction to determine whether the collective bargaining contract provisions in question are lawful in light of the decisions and orders of the Interstate Commerce Commission and the Texas Railroad Commission, and the Court finds that the contract provisions are in conflict with such decisions and orders and thus have no validity, and

IT IS FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment shall be and is in all things denied, and that Defendants' Motion for Summary Judgment shall be and is in all things granted.

Signed and entered this 28th day of October, 1980.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNION OF TRANSPORTATION EMPLOYEES

vs.

OIL TRANSPORT COMPANY AND
GYPSUM TRANSPORT, INC.

CIVIL ACTION NO. CA3-80-0037-F

JUDGMENT

The above styled and numbered cause came on before the Court for hearing on Plaintiff's Motion for Summary Judgment and on Defendants' Motion for Summary Judgment, and after due consideration,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment be denied and that the Defendants' Motion for Summary Judgment be granted; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of the Plaintiff, Union of Transportation Employees, shall be and is dismissed and that the relief sought therein, including an order of this court to require the Defendants to proceed to arbitration under the applicable contract provisions, be denied in all things.

Signed and entered this 28th day of October, 1980.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 301(a) of the National Labor Relations Act, 29 U.S.C. sec. 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Opposition

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On Petition For a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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OIL TRANSPORT COMPANY AND
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

To The Supreme Court Of The United States:

COUNTER-STATEMENT OF THE CASE

Contrary to Petitioner's Statement, the facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A and at 668 F.2d 821).

ARGUMENT

The points of law in this case are not new and are controlled by long standing decisions of this Court. There is no conflict between the Court of Appeal's decision below and any decisions of this Court or any decisions from other Circuit Courts of Appeal. No amount of rhetoric can convert this case into one warranting review on certiorari.

1. The Fifth Circuit correctly held that federal labor policy favoring arbitration requires arbitration be ordered in this case where it cannot be determined with positive assurance that the matter sought to be arbitrated is illegal.

Petitioners' entire case centers on whether there is a clear conflict between the contract language and the collective bargaining agreement and orders of the Interstate Commerce Commission and Texas Railroad Commission. The Petitioners argue that the respective Commissions issued orders which would make the contract language illegal and therefore, there is no point in arbitrating the Petitioners' refusal to follow the contract language. In fact, the Fifth Circuit squarely considered this question and found there was no clear conflict between the contract language and the orders of the administrative bodies. 668 F.2d at 823.

The contract language required fuel surcharges to be used as a factor in computing drivers' pay. The administrative orders required that the Company receive the full increase in revenue derived from certain fuel surcharges. The Fifth Circuit held:

> . . . it is at least arguable that the orders of the respective commissions said nothing about the wages to be paid the drivers or the standards by which the wages were to be computed. The orders said nothing about what is to be paid by the employers from resources independent of those

> received from the fuel surcharges. In the words of *Warrier and Gulf, supra,* we cannot with positive assurance say the wage agreement is not susceptible to the interpretation claimed by the Union. 668 F.2d at 823.

Petitioners' argument to this Court is simply that the Fifth Circuit was wrong in not finding a clear conflict between the orders of the administrative bodies and the contract. This is not an appropriate question for this Court to consider on a Writ of Certiorari. A comparison of the contract language and the orders of the respective Commissions shows that the Fifth Circuit opinion was correct. Moreover, the Fifth Circuit applied well settled principals of law governing the issues in this case in a manner which is consistent with previous decisions of this Court and of other Circuit Courts of Appeal. See *United Steelworkers v. Warrier & Gulf Navigation,* 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Company,* 363 U.S. 564 (1960); *Clothing Workers v. Ratner Corp.,* 602 F.2d 1363 (9th Cir. 1979); *Associated Milk Dealers, Inc. v. Milk Drivers Union Local 753,* 442 F.2d 546 (7th Cir. 1970).

Petitioners' reliance on *Associated Milk Dealers, Inc., supra* is misplaced. First, that case is limited on its facts to the very narrow defense to arbitration which asserts illegality of contract language under the Sherman Antitrust Act. *Id.* at 552. The Court in the *Associated Milk* case therefore recognized a narrow defense to arbitration based on the specific commands of the Sherman Act, but did not fashion a broad public policy defense to arbitration which would be available any time a claim of conflict with some public policy is asserted in an attempt to escape labor arbitration obligations. See *Johns Mansville Sales Corp. v. Local 1609,* 621 F.2d 756 (5th Cir. 1980). Contrary to Petitioners' urgings, the courts have not accepted the claimed public policy defense as a method of substituting judicial for arbitral judgment. *Amalgamated Transit Union Local 1309 v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981).*

In addition, the Court in the *Associated Milk* case determined that if the contract language was in clear conflict with the Sherman Act, there would be a defense to arbitration and remanded the case to the District Court to consider evidence as to whether the contract was in clear conflict with the Sherman Act. *Id.* at 553. In the instant case, the Fifth Circuit simply determined that the evidence had already been presented and that, in fact, there was no clear conflict between the contract language and the orders of the respective Commissions. 668 F.2d at 823.

2. Petitioners' due process claims are spurious and would require this Court to overturn *United Steelworkers v. American Manufacturing Company*.[1]

Petitioners' attempt to raise a due process question in this case by arguing that the Fifth Circuit, in the decision below, did not rule on the question of whether the contract language conflicts with orders of the administrative bodies and therefore, Petitioners will be subjected to two court proceedings in order to have the issue considered after an arbitrator's award is issued. On pages 6 and 7 of their petition, Petitioners state:

> The matter should be decided by the courts in the first instance and a consideration of illegality should be dispositive of the issue.

The problem here is that Petitioners have already got what they are asking for. The Fifth Circuit, in the decision below, recognized that a clear conflict between the contract language and the administrative orders might be a proper defense to arbitration in the first instance, considered the language of the contract as well as the language of the administrative orders, and

---

[1] *supra*, 363 U.S. 564 (1960).

concluded that: "we cannot with positive assurance say that the wage agreement is not susceptible to the interpretation claimed by the Union." 668 F.2d at 823. In addition, the Fifth Circuit, in the opinion below specifically stated that in reaching its' decision:

> . . . we expressly disclaim any notion of requiring arbitration on subjects . . . which, with equal clarity, would violate the law. *Id.* at 823.

Petitioners' due process argument to this Court also assumes Petitioners will lose the arbitration they have been ordered to participate in by the Fifth Circuit, and that the arbitrator's award will be in violation of the orders of the Interstate Commerce Commission and the Texas Railroad Commission. Therefore, Petitioners claim they will be denied due process by first having to arbitrate the question and then having to go to court to challenge the arbitration award as being unenforceable due to an illegal conflict with the administrative orders. This argument is clearly without merit and involves speculation as to the eventual content of an arbitrator's award. Petitioners are simply seeking to have the courts weigh the merits of the grievance. In order to accomplish this mission, Petitioners would have to have this Court overturn its decision in *United Steelworkers v. American Manufacturing Company, supra,* 363 U.S. at 568, since this Court held in that case that the courts have no business weighing the merits of a grievance.

By making a due process argument, Petitioners further seek to avoid the arbitration process. Such a procedure would clearly violate another sound tenant of this Court's *American Manufacturing* holding, wherein this Court stated:

> The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware. *Id.* at 568.

Petitioners are attempting through the guise of a due process argument to get the courts to divine or predict the precise form an arbitrator's award will take, without going through an arbitration procedure. It has long been established that such a role for the courts is not proper. *Carey v. General Electric Co.*, 315 F.2d 499 (2nd Cir. 1963). cert. denied 377 U.S. 908 (1964).

CONCLUSION

There is nothing in this case which merits review by this Court. The judgment of the Fifth Circuit was correct and consistent with previous opinions of this Court, as well as previous opinions of other Circuit Courts of Appeal. Petitioners seek a Writ from this Court solely for the purpose of delay. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Marvin Menaker, counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1982, I served a copy of the foregoing Respondent's Brief in Opposition by mailing three copies in a duly addressed envelope, first class postage prepaid, to Allen C. Schoolfield, Jr., Schoolfield & Smith, 1200 Republic Bank Building, Dallas, Texas, 75201, counsel for Petitioners.

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